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In the Supreme Court of the United States

DAVID A. ZUBIK, *et al.*,

Petitioners,

v.

SYLVIA BURWELL, *et al.*,

Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Third, Fifth, Tenth and D.C. Circuits

BRIEF OF JUSTICE AND FREEDOM FUND AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Justice and Freedom Fund, as *amicus curiae*, respectfully submits that the decisions of the Third, Fifth, Tenth, and D.C. Circuits should be reversed.

Justice and Freedom Fund is a California non-profit, tax-exempt corporation formed on September 24, 1998 to preserve and defend the constitutional liberties guaranteed to American citizens, through education, legal advocacy, and other means. JFF's founder is James L. Hirsen, professor of law at Trinity Law School and Biola University in Southern California and author of New York Times bestseller, *Tales from the Left Coast*, and *Hollywood Nation*. Mr. Hirsen is a frequent media commentator who has taught law school courses on constitutional law. Co-counsel Deborah J. Dewart is the author of *Death of a Christian Nation* (2010) and holds a degree in theology (M.A.R., Westminster Seminary, Escondido, CA). JFF has made numerous appearances in this Court as *amicus curiae*.

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[1] The parties have consented to the filing of this brief. *Amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to its preparation or submission.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The First Amendment has never been confined within the walls of a church, as if it were a wild animal needing to be caged. On the contrary, the Constitution broadly guarantees religious liberty to individuals and certainly to organizations established exclusively for religious purposes.

But now, the Affordable Care Act imposes crippling financial penalties unless Petitioners comply with a legal mandate that guarantees *free access* to contraceptive drugs and related services through their employee health insurance plans (the "Mandate")—in direct conflict with the religious faith that motivates their missions. 42 U.S.C. § 300gg-13(a)(4). This Mandate attacks liberties Americans have treasured for over 200 years—liberties no religious organization can be required to sacrifice as a condition for its continued existence. The Mandate is as great an assault on conscience as the Establishment Clause evil of compelling citizens to support religious beliefs they do not hold. It is anathema to the basic First Amendment principle that the government may not coerce its citizens to endorse or support a cause. The so-called "accommodation" at issue in these cases is a thinly veiled method of compliance. As the Government's own rules explain, a group health plan *complies* with the Mandate through the "accommodation" process.[2] Through this process the Government compels religious organizations to assist

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[2] See Brief for Petitioners, 15-35, et al., pp. 13-14; Brief for Petitioners, 14-1418, et al., pp. 9-14.

their employees in obtaining contraceptives and abortifacents.

Supporters of the Mandate often reframe the issue in terms of gender equality or "discrimination" against women:

> What is the "story" the Mandate tells about the free exercise of religion? That the absolute maximum availability of birth control, sterilization, and drugs that can in some circumstances act to destroy a human embryo are somewhere near the heart of women's equality and freedom.

Helen Alvaré, *No Compelling Interest: The "Birth Control" Mandate and Religious Freedom*, 58 Vill. L. Rev 379 (2013). This argument presumes the Government has a compelling interest in eliminating this species of "discrimination." It reflects the attitude that "reproductive rights" should trump all other liberties:

> Access to contraception and even abortion – promoted and enforced by the government, and subsidized even by unwilling private persons and organizations - is increasingly framed as a "human right" by federal and other authorities. This is intrinsically powerful terminology.

Id. at 390. In *Hobby Lobby*, this Court assumed for the sake of argument that the government had a compelling interest and then tackled the least restrictive means analysis. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2780 (2014). "The least-restrictive-means standard is exceptionally demanding and it is not satisfied here. HHS has not shown that

it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting parties in these cases." *Id.* at 2781. The Eighth Circuit recently followed suit. *Sharpe Holdings, Inc. v. Burwell*, 801 F.3d 927, 943 (8th Cir. 2015).

The "discrimination" argument lacks coherence for another important reason. The Government asserts that signing a simple notice or form is not burdensome and removes Petitioners from delivery of the contraceptives:

> A review of the regulatory accommodation shows that the opt-out mechanism imposes a *de minimis* requirement on any eligible organization: The organization must send a single sheet of paper honestly communicating its eligibility and sincere religious objection in order to be excused from the contraceptive coverage requirement.

Priests for Life v. United States HHS, 772 F.3d 229, 249 (D.C. Cir. 2014). The Government argued to the Tenth Circuit that the notice was a "meaningless exercise." App.Op.Br.5, *Little Sisters of the Poor Home for the Aged v. Burwell*, 794 F.3d 1151 (10th Cir. 2015). Petitioners disagree about the impact—the notice is a legal prerequisite for the Government to commandeer the employer's insurance program—but the *Government*'s litigation position assumes the notice will facilitate greater access to contraception. If the notice were truly meaningless, then signing it would do nothing to achieve the government's alleged interest in gender equality—or any other purpose. There would be no reason for the government to aggressively pursue

Petitioners and coerce compliance. "After all, if the form were meaningless why would the government require it?" *Priests for Life v. United States HHS*, 2015 U.S. App. LEXIS 8326, *58 (D.C. Cir. 2015) (Kavanaugh, J., dissenting from denial of Petition for Rehearing En Banc). Moreover, if the regulatory scheme is "entirely divorced from Petitioners and their plans,"[3] the government cannot logically demonstrate a compelling interest in forcing them to take those actions.

ARGUMENT

I. OPERATING A RELIGIOUS MINISTRY ACCORDING TO RELIGIOUS DOCTRINE AND CONSCIENCE IS NOT THE INVIDIOUS, IRRATIONAL, ARBITRARY DISCRIMINATION THE CONSTITUTION PROHIBITS.

"Conscience is the essence of a moral person's identity.... Liberty of conscience was the foundation for Madison's and Jefferson's and other Framers' views underlying the First Amendment's religion clauses." *E. Tex. Baptist Univ. v. Burwell*, 2015 U.S. App. LEXIS 17281, *18 (5th Cir. Sept. 30, 2015) (Jones, J., dissenting from denial of Petition for Rehearing En Banc).

In spite of the "gender equality" rhetoric, the heart of this case is liberty of conscience—not discrimination. The American legal system has traditionally respected conscience, as illustrated by exemptions granting relief from the moral dilemma created by mandatory military

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[3] *See* Brief for Petitioners, 15-35 et al., p. 40.

service. One case, acknowledging man's "duty to a moral power higher than the State," quotes Harlan Fiske Stone (later Chief Justice):

> "...both morals and sound policy require that the state should not violate the conscience of the individual. All our history gives confirmation to the view that liberty of conscience has a moral and social value which makes it worthy of preservation at the hands of the state. So deep in its significance and vital, indeed, is it to the integrity of man's moral and spiritual nature that nothing short of the self-preservation of the state should warrant its violation; and it may well be questioned whether the state which preserves its life by a settled policy of violation of the conscience of the individual will not in fact ultimately lose it by the process." Stone, *The Conscientious Objector*, 21 Col. Univ. Q. 253, 269 (1919).

United States v. Seeger, 380 U.S. 163, 170 (1965). It is hazardous for any government to crush the conscience of its citizens. But that is exactly what the Mandate does, breeding a nation of persons who lack *conscience*. Even religious organizations must set aside conscience or face ruinous fines. The sheer number of lawsuits testifies to the gravity of the matter.[4]

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[4] Fifty-six (56) religious ministry cases, representing 140 plaintiffs, have been filed. See http://www.becketfund.org/hhsinformationcentral/ ("HHS Mandate Information Central") (last visited 01/05/16).

A. Federal Law Has Long Respected The Conscience Rights Of Both Patients And Health Care Professionals.

There is a long history of respect for the conscience and moral autonomy of both patients and health care professionals. Women may have a legal right to contraception and abortion, but "to demand of a physician that she act in a manner she deems to be morally unpalatable not only compromises the physician's ethical integrity, but is also likely to have a corrosive effect upon the dedication and zeal with which she ministers to patients." J. David Bleich, *The Physician as a Conscientious Objector*, 30 Fordham Urb. L. J. 245 (2002).

After abortion became legal, Congress acted swiftly to preserve the conscience rights of professionals who object to participating in abortions. When Senator Church introduced the "Church Amendment" (42 U.S.C. § 300a-7(c)) for that purpose, he explained that "[n]othing is more fundamental to our national birthright than freedom of religion." 119 Cong. Rec. 9595 (1973). Nora O'Callaghan, *Lessons From Pharaoh and the Hebrew Midwives: Conscientious Objection to State Mandates as a Free Exercise Right*, 39 Creighton L. Rev. 561, 627-628 (2006).

Freedom of conscience is even broader than the "free exercise of religion" the First Amendment explicitly protects. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1491 (1990). Liberty of conscience underlies the Establishment Clause and the unique taxpayer standing rules developed in *Flast v. Cohen*, 392 U.S. 83 (1968):

> [T]he Framers' generation worried that conscience would be violated if citizens were required to pay taxes to support religious institutions with whose beliefs they disagreed.

Ariz. Christian Sch. Tuition Org. v. Winn, 131 S. Ct. 1436, 1446-1447 (2011), quoting Feldman, *Intellectual Origins of the Establishment Clause*, 77 N. Y U. L. Rev. 346, 351 (2002). An equivalent principle is true here. The Mandate requires even religious entities to violate their core faith by facilitating activities they believe are immoral, contrary to our nation's history:

> For the Founders, the not-so-distant history of persecution engendered a fierce commitment to each individual's natural and inalienable right to believe according to his "conviction and conscience" and to exercise his religion "as these may dictate." James Madison, *Memorial and Remonstrance Against Religious Assessments*, reprinted in 2 WRITINGS OF JAMES MADISON 183, 184 (G. Hunt ed. 1901).

Priests for Life, 2015 U.S. App. LEXIS 8326, *17 (Brown, J., dissenting from denial of Petition for Rehearing En Banc).

The Mandate is as much a frontal assault on conscience as the Establishment Clause evil of compelling citizens to support religious beliefs they do not hold. The courts miss the nature of the burden on Petitioners, which the Government characterizes as only signing a single sheet of paper—instead of the draconian penalties they face for non-compliance. But even more modest penalties are constitutionally forbidden: "Thomas More went to the scaffold rather

than sign a little paper for the King." *E. Tex. Baptist Univ. v. Burwell*, 2015 U.S. App. LEXIS 17281, *18 (Jones, J., dissenting from denial of Petition for Rehearing En Banc). As this Court cautioned in *Flast*:

> James Madison, who is generally recognized as the leading architect of the religion clauses of the First Amendment, observed in his famous Memorial and Remonstrance Against Religious Assessments that "the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever." 2 Writings of James Madison 183, 186 (Hunt ed., 1901).

Flast v. Cohen, 392 U.S. at 103.

B. States Have Historically Provided Broad Constitutional And Statutory Protection For Individual Conscience.

Virtually all states offer constitutional and/or statutory protection for liberty of conscience. Courtney Miller, Note: *Reflections on Protecting Conscience for Health Care Providers: A Call for More Inclusive Statutory Protection in Light of Constitutional Considerations*, 15 S. Cal. Rev. L. & Social Justice 327, 331 (2006).[5] Indeed, the vast majority of state

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[5] When this article was published, forty-nine states had some form of conscience clause legislation, with variations as to which providers, institutions, procedures and payors were covered.

constitutions expressly define religious liberty in terms of conscience.[6]

State courts also acknowledge rights of conscience. "Deeply rooted in the constitutional law of Minnesota is the fundamental right of every citizen to enjoy 'freedom of conscience.'" *Rasmussen v. Glass*, 498 N.W.2d 508, 515 (Minn. Ct. App. 1993) (ruling in favor of deli owner who refused delivery to abortion clinic). *See also Humphrey v. Lane*, 728 N.E.2d 1039, 1043 (Ohio 2000) (ruling in favor of corrections officer whose Native American religion required him to maintain long hair); *First Covenant Church v. City of Seattle*, 840 P.2d 174, 187 (Wash. 1992) (city's interest in preservation of aesthetic and historic structures was not compelling enough to burden church's rights to religion and free speech).

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[6] *See* A.R.S. Const. Art. II, § 12; Ark. Const. Art. 2, § 24; Cal. Const. art. I, § 4; Colo. Const. Art. II, Section 4; Del. Const. art I, § 1; Ga. Const. Art. I, § I, Para. III; Idaho Const. Art. I, § 4; Illinois Const., Art. I, § 3; Ind. Const. Art. 1, §§ 2, 3; Kan. Const. B. of R. § 7; Ky. Const. § 1; ALM Constitution Appx. Pt. 1, Art. II; Me. Const. Art. I, § 3; MCLS Const. Art. I, § 4; Minn. Const. art. 1, § 16; Mo. Const. Art. I, § 5; Ne. Const. Art. I, § 4; Nev. Const. Art. 1, § 4; N.H. Const. Pt. FIRST, Art. 4 and Art. 5; N.J. Const., Art. I, Para. 3; N.M. Const. Art. II, § 11; NY CLS Const Art I, § 3; N.C. Const. art. I, § 13; N.D. Const. Art. I, § 3; Oh. Const. art. I, § 7; Ore. Const. Art. I, §§ 2, 3; Pa. Const. Art. I, § 3; R.I. Const. Art. I, § 3; S.D. Const. Article VI, § 3; Tenn. Const. Art. I, § 3; Tex. Const. Art. I, § 6; Utah Const. Art. I, § 4; Vt. Const. Ch. I, Art. 3; Va. Const. Art. I, § 16; Wash. Const. art. 1, § 11; Wis. Const. Art. I, § 18; Wyo. Const. Art. 1, § 18.

C. Like Many Successful Free Exercise Cases, This Case Involves *Conscientious Objectors*—Not Civil Disobedience.

Prior to *Emp't Div., Ore. Dep't of Human Res. v. Smith*, 494 U.S. 872 (1990), many winning cases involved conscientious objectors—believers seeking freedom from state compulsion to commit an act against conscience. *Girouard v. United States*, 328 U.S. 61 (1946); *Sherbert v. Verner*, 374 U.S. 398 (1963) (Sabbath work); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (flag salute); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (education). Losing cases often involve "civil disobedience" claimants seeking to actively engage in illegal conduct, e.g., *Prince v. Massachusetts*, 321 U.S. 158 (1944) (child labor). *Lessons From Pharaoh*, 39 Creighton L. Rev. at 564. *Smith* repeatedly emphasized the *criminal* conduct at issue. *Smith*, 494 U.S. at 874, 878, 887, 891-892, 897-899, 901-906, 909, 911-912, 916, 921.

These cases involve objections to active participation in a government scheme that will ensure Petitioners' employees have free access to contraceptive drugs. Conscientious objector claims like this are "very close to the core of religious liberty." *Lessons From Pharaoh*, 39 Creighton L. Rev. at 565, 611, 615-616. Religious ministries should never have to choose between allegiance to the state and faithfulness to God when their beliefs can be accommodated without sacrificing public peace or safety.

This Court's decision has broad ramifications for the myriad of situations where legal mandates invade conscience. In light of the high value courts, legislatures, and constitutions have historically

assigned to conscience, it is imperative to protect persons and organizations who decline to facilitate morally objectionable medical services.

II. AN EMPLOYER'S REFUSAL TO FACILITATE CONTRACEPTION IS NOT THE INVIDIOUS, IRRATIONAL, ARBITRARY DISCRIMINATION THE CONSTITUTION PROHIBITS.

Modern anti-discrimination principles have expanded over the years, increasing the potential to encroach on religious liberty:

> This conflict between the statutory rights of individuals against private acts of discrimination and the near universally-recognized right of free exercise of religion places a complex legal question involving competing societal values squarely before the courts.

Jack S. Vaitayanonta, Note: *In State Legislatures We Trust? The "Compelling Interest" Presumption and Religious Free Exercise Challenges to State Civil Rights Laws*, 101 Colum. L. Rev. 886, 887 (2001). *See also* Harlan Loeb and David Rosenberg, *Fundamental Rights in Conflict: The Price of a Maturing Democracy*, 77 N.D. L. Rev 27, 29 (2001); David E. Bernstein, *Defending the First Amendment From Antidiscrimination*, 82 N.C. L. Rev. 223 (2003) (urging resolution in favor of First Amendment liberties).

Most services unique to women are not morally objectionable—childbirth, prenatal care, mammograms, pap smears, breast or cervical cancer treatments. These services may not be mandated, but the

willingness of religious employers to provide them indicates they are not biased against women. Seen against the backdrop of common law principles and the First Amendment, Petitioners are not engaged in unlawful discrimination.

A. Anti-Discrimination Provisions Have Expanded To Cover More Places And Protect More Groups—Complicating The Legal Analysis And Triggering Collisions With The First Amendment.

Antidiscrimination policies have ancient roots. The Massachusetts law at issue in *Hurley* grew out of the common law principle that innkeepers and others in public service could not refuse service without good reason. *Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 571 (1995). But Massachusetts broadened the scope, adding more protected categories and places. *Id.* at 571-572. The same trend was apparent in *Dale*. The traditional "places" moved beyond inns and trains to commercial entities and even membership associations—increasing the potential for collision with the First Amendment. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 656 (2000). Protection also expanded, adding criteria such as criminal record, prior psychiatric treatment, military status, personal appearance, source of income, place of residence, and political ideology. *Id.* at 656 n. 2.

Similarly, the predecessor to California's Unruh Act (Cal. Civ. Code § 51), enacted in 1897 to codify common law doctrines, originally encompassed "inns, restaurants, hotels, eating-houses, barber-shops, bath-houses, theaters, skating-rinks, and all other places of public accommodation or amusement." Stats. 1897,

ch. 108, p. 137, § 1, cited in *In re Cox*, 474 P.2d 992, 996 (Cal. 1970). The Act expanded over the years, adding public conveyances (Stats. 1919, ch. 210, p. 309, § 1) and places serving ice cream or soft drinks (Stats. 1923, ch. 235, p. 485, § 1). What the Act clearly forbids is the "irrational, arbitrary, or unreasonable discrimination" prohibited by the Equal Protection Clause. *In re Cox*, 474 P.2d at 999. Discrimination is "arbitrary" where an entire class of persons is excluded without justification. *Marina Point, Ltd. v. Wolfson*, 640 P.2d 115 (Cal. 1982). But it is hardly "arbitrary" to avoid promoting a cause. *Hurley*, 515 U.S. 557 (parade organizers could not be compelled to grant access to an organization promoting a cause they did not support). When Unruh Act amendments were considered in 1974, the Legislative Counsel cautioned that "a construction of the act that would prohibit discrimination on any of the grounds enumerated therein *whether or not such action was arbitrary* would lead to *absurd results*." *Isbister v. Boys Club of Santa Cruz*, 707 P.2d 212, 222 (Cal. 1985) (emphasis added).

This Court has rightly upheld civil rights legislation intended to eradicate America's long history of racial discrimination. *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964). But as protection expands to more places and people, so does the potential to employ anti-discrimination principles to suppress traditional viewpoints and impose social change on unwilling participants. Religious liberty is particularly susceptible to infringement:

> With respect to the great post-modern concerns of sexuality, race, and gender, the advocates of social change are anything but indifferent

> toward the teachings of traditional religion—and since they are not indifferent they are not tolerant.

Michael W McConnell, *"God is Dead and We have Killed Him!" Freedom of Religion in the Post-Modern Age*, 1993 BYU L. Rev. 163, 187 (1993). Political power can be used to squeeze religious views out of public debate about controversial social issues. *Id.* at 188.

The clash between anti-discrimination principles and the First Amendment is particularly volatile when a morally controversial practice is protected and religious entities are swept within the ambit of the law. Government has no right to legislate a particular view of sexual morality and compel religious persons to facilitate it. Religious voices have shaped views of sexual morality for centuries. These views about right and wrong are deeply personal convictions that shape the daily lives of individuals and the policies of religious organizations.

The clash between non-discrimination rights and religious liberty "places a complex legal question involving competing societal values squarely before the courts." *In State Legislatures We Trust?*, 101 Colum. L. Rev. at 887. When the D.C. Circuit addressed the question "of imposing official orthodoxy on controversial issues of religious, moral, ethical and philosophical importance, upon an entity whose role is to inquire into such matters" it concluded that "[t]he First Amendment not only ensures that questions on difficult social topics will be asked, it also *forbids government from dictating the answers*." *Gay Rights Coalition of Georgetown Univ. Law Ctr. v. Georgetown Univ.*, 536 A.2d 1, 24 (D.C. 1987) (emphasis added).

Non-discrimination rights, whether created by statute or derived from equal protection principles, may conflict with core rights to religious liberty *Fundamental Rights in Conflict*, 77 N.D. L. Rev. at 27, 29.

The growing conflict between religion and nondiscrimination principles emerges in varied contexts. *Defending the First Amendment From Antidiscrimination*, 82 N.C. L. Rev. at 224-225. Employers may find themselves in a conundrum—protecting one group of employees while alienating another. Solutions are difficult to craft, particularly in the wake of expanding privacy rights. But even though private sexual conduct is legally protected from government intrusion, that protection does not trump the First Amendment rights of those who cannot conscientiously endorse or facilitate it.

B. Many Decisions Necessitate Selection Criteria.

Discrimination may or may not be invidious, depending on the context and identity of the one who discriminates. Employers "discriminate" when they select employees from a pool of applicants. Students experience "discrimination"—admissions, honor rolls, sports teams, or activities requiring a certain grade point average. *Hsu v. Roslyn Union Free Sch. Dist. No. 3*, 85 F.3d 839, 871 (2d Cir. 1996). Where selection criteria are truly irrelevant, protection is reasonable. But it is impossible to eradicate all action that might conceivably be termed "discrimination." Here, Petitioners' refusal to cover generally available drugs and services—fraught with religious and moral concerns—is not discrimination at all.

C. Where "Discrimination" Is Integrally Related To The Exercise Of A Core Constitutional Right, It Is Not Arbitrary, Irrational, Or Unreasonable.

Calling Petitioners' actions "discrimination" is an offense to the faith of millions of Americans and ministries serving the public. Action motivated by conscience and faith is not the invidious discrimination the Constitution prohibits. In the unemployment cases, this Court warned that "to consider a religiously motivated resignation to be 'without good cause' tends to exhibit hostility, not neutrality, towards religion." *Hobbie v. Unemployment Appeals Comm'n of Florida*, 480 U.S. 136, 142 (1987); *Thomas v. Review Bd. of Ind. Emp't*, 450 U.S. 707, 708 (1981). Similarly, this Court would exhibit hostility toward religion by equating Petitioners' religious objections to the Mandate with unlawful "discrimination."

Petitioners are motivated by religious doctrine—not bias against women. Motivation is critical. A person who deliberately refuses medical treatment, desiring to die, commits suicide. But a person who wants to live, yet refuses treatment based on religious convictions, does not. Gerard V Bradley, *Beguiled: Free Exercise Exemptions And The Siren Song of Liberalism*, 20 Hofstra L. Rev. 245, 263-264 (1991). Killing another person in self-defense is justifiable homicide. But the same act—premeditated with malice aforethought—is first degree murder. Only the latter warrants legal penalties.

D. A Narrowly Crafted Exemption Would Not Constitute The Arbitrary, Unreasonable Discrimination The Constitution Rightly Prohibits.

This case involves no allegations that Petitioners discriminate against women in hiring, compensation, or other policies. But they cannot comply with the Mandate without sacrificing allegiance to their core convictions. General anti-discrimination principles should not be applied so expansively as to eviscerate First Amendment rights. The Mandate extends far beyond the "meal at the inn" promised by common law and encroaches on a religious organization's right to conduct its mission according to its faith. When this Court rejected a 400-member dining club's challenge to a state anti-discrimination law, it recognized an expressive association's right to exclude members who disagree with the group's views. What the club could not do is use characteristics like race and sex as "shorthand measures" in place of legitimate membership criteria. *New York State Club Ass'n, Inc. v. City of New York,* 487 U.S. 1, 13 (1988). Petitioners use no "shorthand" to discriminate against women—rather, they object to facilitating a narrow range of morally objectionable services.

E. Contraception Is A Gender-Neutral Term.

When the Eighth Circuit considered gender discrimination for purposes of Title VII, as amended by the Pregnancy Discrimination Act of 1978, 42 U.S.C. §2000e(k), the court concluded that contraception is gender-neutral. Title VII generally precludes employment decisions based on gender. *In re Union*

Pac. R.R. Emp't Practices Litig., 479 F.3d 936, 944 (8th Cir. 2007). But where "an employer's action is not based on a sex classification, it is not a sex-based violation of Title VII. *See Piantanida v. Wyman Ctr., Inc.*, 116 F.3d 340, 342 (8th Cir. 1997)." *Id.* Moreover, contraception, like infertility, is "not a gender-specific term." *Id.* at 942; *see Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674, 680 (8th Cir. 1996) ("because the policy of denying insurance benefits for treatment of fertility problems applies to both female and male workers...[it] is gender-neutral"). Petitioners' refusal to facilitate contraception is based solely on religious doctrine—not the sex of any employee.

III. THE RIGHT TO ACCESS CONTRACEPTION DOES NOT JUSTIFY COERCED FACILITATION BY UNWILLING PRIVATE EMPLOYERS.

The First Amendment protects against government coercion to endorse or subsidize a cause. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977); *Barnette*, 319 U.S. 624. The government has no power to force a *speaker* to support or oppose a particular viewpoint. *Hurley*, 515 U.S. at 575. Religious liberty collapses under the weight of secular ideologies that employ the strong arm of the state to advance their causes, promoting tolerance and respect for some while ruthlessly suppressing others. *"God is Dead and We have Killed Him!"*, 1993 BYU L. Rev. at 186-188.

The Mandate grates against the Constitution, essentially banning religious believers—and even organizations—from full participation in society. Its crippling financial penalties threaten to shut down organizations like Petitioners. This is tantamount to a

statement that "no religious believers who refuse to [facilitate contraception] may be included in this part of our social life." *Lessons From Pharaoh*, 39 Creighton L. Rev. at 573.

Women may have a legal right to contraception and abortion, but they have no corollary right to draft their employers as unwilling accomplices who must ensure cost-free access. In the companion case to *Roe v. Wade*, 410 U.S. 113 (1973), this Court left intact Georgia's statutory protections for health care workers who object to participating in abortions. *Doe v. Bolton*, 410 U.S. 179, 205 (1973) (quoting Ga. Crim. Code § 26-1202(e) (1968)). The Mandate now compels a private employer to become a "de facto accomplice" to a morally objectionable agenda. In this "clash of autonomies," employers are entitled to equal protection of their "right to choose." Miller, *Reflections*, 15 S. Cal. Rev. L. & Social Justice at 340-341, 344.

A. Abortion Is A Highly Controversial, Divisive Issue.

Americans on both sides of the abortion debate are equally entitled to constitutional protection for their respective positions. The government itself may adopt a position, but it departs from the Constitution when it compels private employers to facilitate and/or finance morally objectionable services contrary to conscience. "Reproductive rights" do not trump the inalienable First Amendment rights of citizens who cannot in good conscience support—let alone facilitate—those rights. Abortion is too controversial to justify this severe intrusion on liberty of conscience.

Many deeply religious people view contraception and/or abortion as grave moral wrongs. Concerned citizens across the country have enacted regulations, including informed consent, parental notice, waiting periods, and laws regulating medical personnel and facilities. The ensuing legal challenges are legion. But the very enactment of such restrictions is evidence that Americans are profoundly troubled and deeply divided.

Even if this case truly involved sex discrimination, the contentious nature of abortion distinguishes this case from *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983) (tax-exempt status denied to racially discriminatory school). Charitable activities must not be "contrary to settled public policy" (*id.* at 585)—and there is a "firm national policy to prohibit racial segregation and discrimination in public education" (*id.* at 593). That policy justified denial of charitable status to a racially discriminatory institution. There is no comparable policy favoring abortion rights—but rather intense division and passion as the debate rages on.

B. Religious Freedom Should Not Be Dismantled To Coerce Private Entities To Facilitate Reproductive Rights.

America was founded by people who risked their lives to escape religious tyranny and observe their faith free from government intrusion. Congress has ranked religious freedom "among the most treasured birthrights of every American." Sen. Rep. No. 103-111, 1st Sess., p. 4 (1993), reprinted in 1993 U.S. Code Cong. & Admin. News, at pp. 1893-1894. This Court expressed it eloquently in ruling that an alien could not be denied citizenship because of his religious objections to bearing arms:

> The struggle for religious liberty has through the centuries been an effort to accommodate the demands of the State to the conscience of the individual. The victory for freedom of thought recorded in our Bill of Rights recognizes that in the domain of conscience there is a moral power higher than the State. Throughout the ages, men have suffered death rather than subordinate their allegiance to God to the authority of the State. Freedom of religion guaranteed by the First Amendment is the product of that struggle.

Girouard v. United States, 328 U.S. at 68. We dare not sacrifice priceless American freedoms through misguided—or even well-intentioned—government efforts to broaden access to contraception. Religious organizations have not forfeited their right to pursue their missions in a manner consistent with their faith.

C. No Person Has A Constitutional Right To *Free* Contraception. Accommodation Of A Private Employer's Conscience Does Not Threaten Any Employee's Rights.

No private party is obligated to facilitate or fund another party's rights. But that is exactly what the Mandate does by requiring Petitioners to facilitate *free* access to morally objectionable services. Employees are free to use contraception—but they have no constitutional right to compel their *employers* to provide them with cost-free access. An employer pays for an employee's time and services. It does not monitor—let alone endorse—every purchase the *employee* decides to make.

Even the government is not obligated to finance contraception/abortion or ensure the most convenient access. The state may prefer childbirth and allocate resources accordingly. *Harris v. McRae,* 448 U.S. 297, 315 (1980); *Rust v. Sullivan*, 500 U.S. 173, 201 (1991). The government has "no affirmative duty to 'commit any resources to facilitating abortions.'" *Id.*, quoting *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 511 (1989); *see Bowen v. Kendrick,* 487 U.S. 589, 596-597 (1988) (the Adolescent Family Life Act restricts funding to "programs or projects which do not provide abortions or abortion counseling or referral"). The government's sole obligation is not to impose an "undue burden." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 873 (1992). Accommodation of the employer's conscience imposes no burden on any employee's right to access contraception independently. An employer does not impose its religion on employees merely by declining to facilitate seamless, cost-free contraceptives—but the Mandate imposes an "undue burden" on the employer's rights.

Some advocates argue that courts must balance conflicting interests and not necessarily accommodate religion where the rights of third parties are detrimentally affected. *Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67, 93-94 (Cal. 2004); *Catholic Charities of Diocese of Albany v. Seri*, 859 N.E.2d 459, 461 (N.Y. 2006) (same). Some earlier free exercise cases did not implicate third party rights, so it was unnecessary to balance rights. *Sherbert v. Verner*, 374 U.S. 398 (unemployment); *Wisconsin v. Yoder*, 406 U.S. 205 (parental rights to educate children). In other cases, courts have denied religious exemptions where accommodation would

endanger minor children and/or community health. *Reynolds v. United States*, 98 U.S. 145 (1878) (polygamy); *Prince v. Massachusetts*, 321 U.S. 158 (child labor); *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (vaccination); *Walker v. Superior Court*, 763 P.2d 852 (Cal. 1988) (parental failure to seek medical treatment for child). In these cases, the restriction on religious liberty was narrow and the religious conduct "invariably posed some substantial threat to public safety, peace or order." *Sherbert v. Verner*, 374 U.S. at 403. In other cases, courts have balanced conflicting rights. Sometimes the outcome hinges on the nature and extent of infringement on the relevant rights. The Jaycees and Rotary lost free association claims because they could not show that admitting female members would actually hinder their organizational expression. *Roberts v. United States Jaycees*, 468 U.S. 609, 624 (1984); *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 548 (1987).

More recently, First Amendment rights to free association have trumped statutory anti-discrimination rights. *Hurley*, 515 U.S. 557; *Boy Scouts of Am. v. Dale*, 530 U.S. 640. This Court cannot brush aside Plaintiffs' conscientious objections to the Mandate without flouting these precedents. Protection of "reproductive rights" does not justify compelling a religious organization to disregard its core convictions or risk financial ruin. That is particularly true in the absence of any employee's constitutional right to access contraception through her employer's health plan.

D. Other Cases Involving Similar State Mandates Left The Objector With A Viable Choice. This Mandate Does Not.

Cases involving similar state mandates—while imposing an arguably unacceptable burden on religious faith—allowed some means of escape. Religious organizations in the *Catholic Charities* cases were required to include contraception in their prescription drug plan but could discontinue drug coverage:

- *Catholic Charities of Sacramento*, 85 P.3d at 76 ("[T]he WCEA implicitly permits any employer to avoid covering contraceptives by not offering coverage for prescription drugs.);
- *Catholic Charities of Diocese of Albany*, 859 N.E.2d at 468 ("WHWA does not literally *compel* them to purchase contraceptive coverage for their employees, in violation of their religious beliefs; it only requires that policies that provide prescription drug coverage include coverage for contraceptives. ")

These proposed "solutions" are counter-productive and harmful, restricting access to goods and services. Elimination of drug coverage would harm *all* employees, including women who desired contraceptives. But these alternatives—undesirable as they are—pale in comparison to the draconian HHS Mandate, which leaves larger employers with virtually no escape hatch.

IV THE GOVERNMENT DISCRIMINATES AGAINST RELIGIOUS EMPLOYERS WHO HOLD CONSCIENTIOUS OBJECTIONS TO CONTRACEPTION.

There *is* discrimination lurking in the shadows of this cases—not discrimination against *women*, but the government's blatant discrimination against religion. The Mandate's onerous financial penalties threaten the existence of employers who cannot in good conscience comply. But "[n]o person can be punished for entertaining or professing religious beliefs or disbeliefs...." *Everson v. Bd. of Educ. of Ewing*, 330 U.S. 1, 15-16 (1947). A citizen may not be excluded from a profession by unconstitutional criteria. *Baird v. State Bar of Arizona*, 401 U.S. 1, 6-7 (1971) (attorney); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 607 (1967) (professor). This is itself a form of discrimination. It is equally unconstitutional to jeopardize the continued existence of a religious organization. This Court has a "duty to guard and respect that sphere of inviolable conscience and belief which is the mark of a free people." *Lee v. Weisman*, 505 U.S. 577, 592 (1992).

A. Even In The Commercial Sphere, Believers Do Not Forfeit Their Constitutional Rights.

The Mandate discriminates against people of faith by effectively squeezing them out of full participation in civic life. *Lessons From Pharaoh*, 39 Creighton L. Rev. at 561-563. Religion does not end where daily life begins. If religion is shoved to the private fringes of life, constitutional guarantees ring hollow. *"God is Dead and We have Killed Him!"*, 1993 BYU L. Rev. at 176. Moreover, morality necessarily intersects the public

realm. Religious organizations should be free to operate with the same level of honesty and integrity that customers expect when they transact business with for-profit entities.

The state actively regulates commerce but has minimal control over the internal affairs of religious entities. Conflicts between religion and regulation typically occur in settings beyond the walls of a church:

- *Braunfeld v. Brown,* 366 U.S. 599 (1961) (Sunday closing);
- *Sherbert v. Verner,* 374 U.S. 398 (and other unemployment cases);
- *United States v. Lee*, 455 U.S. 252 (1982) (Amish business);
- *Roberts v. United States Jaycees*, 468 U.S. 609 (commercial association);
- *Tony and Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290 (1985);
- *State ex rel. McClure v. Sports & Health Club, Inc.*, 370 N.W.2d 844, 853 (Minn. 1985) (hiring);
- *Rasmussen v. Glass,* 498 N.W.2d 508 (food delivery);
- *Swanner v. Anchorage Equal Rights Comm'n,* 874 P.2d 274 (Alaska 1994) (housing);
- *Attorney Gen. v. Desilets*, 636 N.E.2d 233 (Mass. 1994) (same);
- *Catholic Charities of Sacramento*, 85 P.3d at 93.

Some claimants succeeded (*Sherbert, Rasmussen, Desilets*), while others did not (*Braunfeld, Lee, Roberts, Alamo Found., McClure, Swanner, Catholic Charities*). The "commercial" factor does not dictate the outcome.

But with the advent of the draconian HHS Mandate to facilitate free access to contraception and abortifacent drugs, even pervasively religious organizations have no safe haven from the strong arm of the state.

United States v. Lee is often cited to oppose religious exemptions in the commercial sphere. *Catholic Charities of Sacramento,* 85 P.3d at 93. But *Lee* does not hold that believers forfeit their constitutional rights when they step beyond the borders of a church. Note the context of the often cited language:

> Congress and the courts have been sensitive to the needs flowing from the Free Exercise Clause, but *every* person cannot be shielded from *all* the burdens incident to exercising *every* aspect of the right to practice religious beliefs. When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity.

United States v. Lee, 455 U.S. at 261 (emphasis added). Religious freedom is more limited in the commercial realm—but not abrogated altogether. And where religious organizations are serving the community, there surely ought to be a safe sanctuary to provide services in a manner consistent with their faith.

B. The Arguments Are Even More Compelling Where The Employer Is A Religious Organization.

The First Amendment demands government neutrality so that each religious creed may "flourish according to the zeal of its adherents and the appeal of its dogma." *Zorach v. Clauson*, 343 U.S. 306, 313 (1952). Religious organizations have an affirmative constitutional right to oppose abortion and decline to facilitate it, free of government intrusion. Many—like Little Sisters of the Poor and other Petitioners—provide services and ministry to the community in accordance with the tenets of their faith. The Constitution bars any public official from prescribing orthodoxy in religion. *Barnette*, 319 U.S. at 642. The Mandate guts the First Amendment, brazenly exhibiting the "callous indifference" to religion never intended by the Establishment Clause. *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984), citing *Zorach*, 343 U.S. at 314. The Constitution "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." *Id.*

Even if Petitioners were business corporations, the Mandate presents an unconstitutional burden. But Petitioner are religious to the core—and "the text of the First Amendment itself...gives special solicitude to the rights of religious organizations." *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 132 S. Ct. 694, 706 (2012). Over a century ago this Court observed that:

> *Watson* "radiates ... a spirit of freedom for religious organizations, an independence from secular control or manipulation—in short, power

> to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94, 116 (1952).

Id. at 704, referencing *Watson v. Jones*, 80 U.S. 679 (1872). Petitioners have determined that it would violate core "faith and doctrine" to comply with the Mandate in the manner prescribed by the government.

Moreover, the Mandate does not fit the contours of *Smith*. As this Court explained in *Hosanna*:

> *Smith* involved government regulation of only outward physical acts. The present case, in contrast, concerns government interference with an internal church decision that affects the faith and mission of the church itself.

Hosanna, 132 S. Ct. at 707, citing *Smith*, 494 U.S. at 877 (distinguishing the government's regulation of "physical acts" from "lend[ing] its power to one or the other side in controversies over religious authority or dogma"). Although *Hosanna* involved the right of a religious organization to select ministerial employees, it implies broad liberty to determine and apply religious doctrine in the operation of a ministry, including other aspects of the employment relationship. The Mandate encroaches on this liberty by allowing the government to hijack the health insurance plans of religious organizations to provide their employees with free access to drugs and services that clash with the organizations' religious doctrine.

V. THE GOVERNMENT CANNOT SATISFY THE DEMANDING COMPELLING INTEREST PRONG.

In order to establish a "compelling interest" in accord with this Court's demanding criteria, the Government must "specifically identify an 'actual problem' in need of solving" and show that the burden on Petitioners' rights is "actually necessary" for the solution. "Predictive judgment[s]" and "ambiguous proof" are insufficient. Alvaré, *No Compelling Interest*, 58 Vill. L. Rev. at 432, quoting *Brown v. Entertainment Merchants Association*, 131 S. Ct. 2729, 2738-2739 (2011). The Government would need to demonstrate that cost-free, "seamless" access to contraceptive drugs is "actually necessary" for women to achieve equality—turning a blind eye to decades of progress attributable to other factors and degrading women with its "predictive judgment" that they are unable to take even minimal alternative steps if the government offered them free contraception outside their employers' health plans.

A. The Government's Condescending Rationale Demeans Women.

The Government repeatedly complains, in its opposition briefs, that "[a]t a minimum, the alternatives would require women to take steps to learn about, and to sign up for, a new government funded and administered health benefit." *See, e.g.*, Opp.Pet. 14-1418, at 27, citing *Hobby Lobby*, 134 S. Ct. at 2783 (Kennedy, J., concurring). Allegedly "[t]hose burdens would constitute a substantial barrier to full and equal health coverage for women. The point of requiring coverage of preventive services without cost-

sharing is that even small burdens impair access to those services." Opp.Pet. 14-1418, at 27; Opp.Pet. 15-35, at 23. The courts bought this argument: "Providing contraceptive services seamlessly together with other health services, without cost sharing or additional administrative or logistical burdens and within a system familiar to women, is necessary to serve the government's interest." *Priests for Life*, 772 F.3d at 265. But the Government's approach quickly backfires:

> Ironically, it is the dissent's approach that would "[i]mped[e] women's receipt of benefits by 'requiring them to take steps to learn about, and to sign up for, a new government funded and administered health benefit,'" *post*, at 2802 because the dissent would effectively compel religious employers to drop health-insurance coverage altogether, leaving their employees to find individual plans on government-run exchanges or elsewhere. This is indeed "scarcely what Congress contemplated."

Hobby Lobby, 134 S. Ct. at 2783 (Kennedy, J., concurring).

Moreover, as one commentator observed two decades ago:

> [I]t is an offensive and sexist notion that women must deny what makes them unique as women (their ability to conceive and bear children), in order to be treated "equally" with (or by) men. Genuine equality between the sexes will be reached on that day when women can affirm what makes them unique as women and still be treated fairly by the law and society.

Paul Benjamin Linton, *Planned Parenthood v. Casey: The Flight From Reason in the Supreme Court*, 13 St. Louis U. Pub. L. Rev. 15, 46 (1993); *see also* David Smolin, *The Jurisprudence of Privacy in a Splintered Supreme Court*, 75 Marquette L. Rev. 975, 1001-13 (Summer 1992).

B. Other Factors Are Responsible For The Progress of Gender Equality Over The Past Several Decades.

Never before have women had such a sweeping right to force unwilling employers to facilitate free access to contraceptives or incur financial penalties that threaten their very existence. Yet women have made extraordinary progress in their ability to participate fully in American society. That progress in "gender equality" is attributable to a wide variety of factors unrelated to the easy availability of contraception or abortion:

> Virtually all progress in women's legal, social and employment rights over the past 30 years has come about through federal or state legislation and judicial interpretation wholly unrelated to and not derived from *Roe v. Wade*.

Paige C. Cunningham & Clarke D. Forsythe, *Is Abortion the "First Right" for Women?: Some Consequences of Legal Abortion*, in Abortion, Medicine and the Law 154 (J. Butler & D. Walbert eds., 4th ed. 1992). Such progress began decades ago, before the controversial Mandate was on the horizon. Legislation protects women against unlawful discrimination in employment and other contexts:

- Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000 *et seq.*, as amended by the Equal Employment Opportunity Act of 1972, Pub. L. 92-261, and the Pregnancy Discrimination in Employment Act amendments of 1978, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k) (1982)) (discrimination in public and private employment);
- 5 U.S.C. § 201 (mandating anti-discrimination policy in federal employment);
- 5 U.S.C. § 2302(b)(1) (anti-discrimination in personnel policies);
- Fair Labor Standards Act of 1938, 29 U.S.C. § 206(d), as amended by the Equal Pay Act of 1963, 77 Stat. 56, 29 U.S.C. § 206(d) (1988) (mandating equal pay);
- Federal Unemployment Tax Act, 26 U.S.C. § 3304(a)(12) (forbidding discrimination on account of pregnancy in granting unemployment compensation benefits);
- 20 U.S.C. § 1221e(a) (mandating anti-discrimination policy in educational institutions receiving federal funds).

See Linton, *Planned Parenthood v. Casey: The Flight From Reason*, 13 St. Louis U. Pub. L. Rev. at 44 n. 130 (listing these and other statutes). Many states have constitutional and statutory provisions protecting women against discrimination. *Id.* at 45 n. 131. These protections facilitate access to higher education, better jobs, and a woman's choice to become pregnant and bear a child without sacrificing her career. The same

courts that find the Mandate necessary simultaneously acknowledge that significant progress in gender equality occurred long before the advent of the Mandate:

> "The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives." *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 856 (1992); 78 Fed. Reg. at 39,873 ("[A]ccess to contraception improves the social and economic status of women."). Congress noted when enacting the Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e *et seq.*), and Family and Medical Leave Act, Pub. L. No. 103-3, 107 Stat. 6 (codified at 29 U.S.C. § 2601 *et seq.*), a woman's ability to get pregnant has led to pervasive discrimination in the workplace.

Priests for Life, 772 F.3d at 263.

In light of less onerous alternatives the government has already used to provide women with equal opportunities, it is disingenuous to assert that easy, cost-free access to contraception—coerced through employer participation—is necessary or even desirable to combat discrimination against women.

C. Other Factors Render It Impossible To Establish The Required Causal Link Between The Mandate And Gender Equality.

Not all women of childbearing age desire contraception:

> [W]omen have a true variety of reasons for not using contraception that the law cannot mitigate or satisfy simply by attempting to increase access to contraception by making it "free."

Alvaré, *No Compelling Interest*, 58 Vill. L. Rev. at 380. The Government presumes that contraception (and even elective abortion) is desirable to women and that cost-free access to it is necessary for their health and quality. As several of the Petitions observe, many of the women employed by religious organizations share their employers' moral objections. *See, e.g.*, Pet. 15-35 (E. Tx. Baptist Univ.), at 36; Reply 15-119 (So. Nazarene Univ.), at 10 ("The Universities' employees and students share their religious belief that use of the four FDA-approved contraceptives in question is sinful because they may have an abortifacient effect. Pet. App. 167a-68a."). The Government's case is based on unsupported assumptions and fails to consider the actual needs and desires of the women involved.

Another factor is the employment status of the women who allegedly require free contraception. The Mandate only addresses women who are employed (or dependents of an employee), but "studies on the incidence of unintended pregnancy univocally report that unintended pregnancy is highly concentrated among low income women - who are already amply

provided free or very lost cost contraception by federal and state governments." Alvaré, *No Compelling Interest*, 58 Vill. L. Rev. at 399.

V. IRONICALLY, THE MANDATE WEAKENS CONSTITUTIONAL PROTECTION FOR EVERYONE—INCLUDING THOSE WHO ADVOCATE IMPOSING IT ON UNWILLING PRIVATE EMPLOYERS.

"Reproductive rights" is a relatively recent judicial development. Advocates accomplished this dramatic transformation through the political process, exercising rights to free speech, press, and association. But no group can demand for itself what it would deny to others—otherwise, the constitutional foundation will crumble and all Americans will suffer. Overly aggressive assertion of particular rights can erode protection for other liberties. Here, the Mandate directly attacks the freedom of employers who object to contraception and/or abortion. The rights of women to reproductive services do not trump the rights of everyone else, particularly since no person has a right to coerce public or private entities to provide seamless, cost-free access. Americans who want to expand their own civil rights must grant equal respect to opponents—not crush them with debilitating legal penalties: "The price of freedom of religion or of speech or of the press is that we must put up with, and even pay for, a good deal of rubbish." *United States v. Ballard*, 322 U.S. 78, 95 (1944).

> If Americans are going to preserve their civil liberties...they will need to develop thicker skin.... The current trend...is to give offended

> parties a legal remedy, as long as the offense can be construed as "discrimination."

Defending the First Amendment From Antidiscrimination, 82 N.C. L. Rev. at 245.

This principle cuts across all viewpoints and constitutional rights. The First Amendment protects a broad spectrum of expression, popular or not. In fact, the increasing popularity of an idea makes it all the more essential to protect dissenting voices. *Boy Scouts of Am. v. Dale*, 530 U.S. at 660. Censorship spells death for a free society. "Once used to stifle the thoughts that we hate...it can stifle the ideas we love." *Gay Alliance of Students v. Matthews*, 544 F.2d 162, 167-168 (4th Cir. 1976). Justice Black said it well in a case about the Communist Party, which advocated some of the most dangerous ideas of the twentieth century:

> "I do not believe that it can be too often repeated that the freedoms of speech, press, petition and assembly guaranteed by the First Amendment must be accorded to the ideas we hate or sooner or later they will be denied to the ideas we cherish."*Communist Party v. SACB*, 367 U.S. 1, 137 (dissenting opinion) (1961).

Healy v. James, 408 U.S. 169, 187-188 (1972). *Healy* is about association rights—not reproductive rights. But the liberty of all Americans will suffer irreparable harm if a judicially manufactured right to coerced facilitation of reproductive rights is allowed to stifle rights of religion and conscience. Non-discrimination principles should never be applied in a discriminatory, unequal manner that squelches the First Amendment rights of others.

CONCLUSION

This Court should reverse the circuit court rulings.

Respectfully submitted,

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